



# THE ATTORNEY GENERAL OF TEXAS

GERALD C. MANN  
~~DEPUTY ATTORNEY GENERAL~~  
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Joe P. Hatchitt  
District Attorney  
Corpus Christi, Texas

Dear Sir:

Attention: Authur A. Klein

Opinion No. 0-4611

Re: Under the facts submitted should  
the district attorney proceed  
with the hearing concerning the  
destruction of gambling devices?

From your recent letter we are apprised of the following facts:

Officers seized certain gambling devices and slot machines at a club being operated in the city of Brownsville. After ascertaining the name and address of the owner of the seized machines, they proceeded to his home to arrest him. At the rear of the residence they observed a warehouse and approaching it saw slot machines through an open door. The owner was not present and the officers left to make further inquiry and search for him. Later they returned to the warehouse and without a search warrant, proceeded to take into their possession ten slot machines. Proceedings for the destruction of the ten slot machines having been instituted, the owner now contests their destruction on the grounds: (1) the officers had no search warrants; (2) the equipment seized was on the owner's home premises; (3) the machines seized were not being used at the time for gambling purposes.

As we understand your inquiry, you wish to know whether the machines seized at the warehouse may be legally destroyed.

The Dallas Court of Civil Appeals in two recent cases seems to have rendered opinions decisive of your question. We refer to Callison v. State, 146 S. W. (2d) 468, and Hightower v. State, 156 S. W. (2d) 327. In the latter case writ of error was refused by the Supreme Court on January 14, 1942. In the Callison case no writ was sought.

The facts in the Callison case disclose that police officers of the city of Dallas by virtue of a warrant properly obtained, seized several thousand punchboards, labels and other punchboard accessories from a warehouse of the appellant. The district attorney of Dallas County in compliance with Articles 636 and 637 of the Penal Code proceeded to file for a destruction order upon said devices seeking their destruction as gambling devices. At a hearing before the trial court the devices were ordered destroyed. On appeal the Court of Civil Appeals reversed the trial court, holding that for the devices to be within the contemplation of Articles 636 and 637, Penal Code, it must appear that the devices were being used or exhibited for gaming purposes. While the court held that punchboards were gambling devices per se and could not be used for any other purpose, we quote the following language with reference to the proposition that the devices must be exhibited or be used for gaming purposes:

"The aim of the statute, under which this proceeding is brought, is to prohibit the use or exhibition of all possible games that fall under the classification of lotteries or gambling devices. The character of the property seized, that is, its make-up, does not authorize its confiscation and destruction. The boards were stored and locked in a warehouse, and were, in no manner, used or exhibited for the purpose of gaming or obtaining betters.

"In the enactment of the statutes under which this action was brought, the Legislature did not see fit to condemn all property that might be used for gaming, and authorize its destruction, unless it be shown that such property was designed for gaming and was, at the time of seizure, being used for the purpose of gaming. Thus, courts cannot extend the statute so that gaming devices may be confiscated and destroyed in the absence of evidence that same were being used or exhibited for gaming. That such was not defendant's purpose, is evident. The property was so stored that it could not reasonably be said that it was exhibited, and, certainly, it was not being used for gaming.

"The judgment of the court below is reversed, the order condemning, confiscating and destroying defendant's property is set aside, and the cause is remanded with instructions that the property seized be ordered returned to defendant."

In the Hightower case, supra, the court said a slot machine is not a "gaming device per se" and courts cannot take judicial notice that every slot machine is a gambling device, since the use to which it is put must determine its character. It was also asserted that the fact that gambling was the only reasonable and profitable purpose for which slot machines might be used did not authorize their destruction in absence of a showing that the machines were made to pay off, that an understanding was had with the proprietor to the same effect or that the proprietor knew of and acquiesced in the betting.

We have come to the conclusion, in view of the holding in the above cases, that the machines seized in the warehouse as described by you, are not subject to destruction under the statutes.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Benjamin Woodell  
Assistant

BW:GO:j1

APPROVED  
OPINION  
COMMITTEE

By /s/ BWB  
CHAIRMAN